CHOP SUN CHEONG LOONG AND LIM CHENG KIM (f)

(Plaintiffs-Appellants)

vs.

LIAN TECK TRADING CO. OF KUALA LUMPUR

(Defendants-Respondents).

[App. Civil Juris. (Willan, C.J. Malayan Union, Murray-Aynsley, C.J. Singapore and Protheroe, J.) October 15, 1947]

Courts (Restriction of Civil Jurisdiction) Ordinance 1946 Section 3 (1) (d) — Ejectment action against Japanese-occupation tenant — whether such action is one concerning a dealing in land — Interpretation of Statutes — 1932 Rule 1 (31) F.M.S. Rules of Practice and Procedure — Courts (Restriction of Civil Jurisdiction) (Amendment) Ordinance 1947 — Power of Stay.

The plaint alleged that on the 10th day of November 1945 the second plaintiff, who was the owner of a shop-house, granted a tenancy of that house to the first plaintiff and that the defendants, who were occupying the house, were trespassers. The plaintiffs claimed possession, mesne profits etc.

The material points raised by the defendants were —

1. That they were lawfully in possession, having been given possession by the Japanese Custodian of Enemy Property and their tenancy never having been duly terminated by notice or otherwise.
2. That by virtue of Section 3 (i) (d) of the Courts (Restriction of Civil Jurisdiction) Ordinance, 1946, (hereinafter called the Ordinance) the Court had no jurisdiction to try the suit.

The Ordinance came into force on the 1st July 1946 and the plaint was filed shortly thereafter. Prior to the hearing the plaintiffs formally admitted that the premises were let to the defendants by the Japanese Custodian of Enemy Property and it became clear on the agreed correspondence that no one month's notice determining the tenancy had been given by the second plaintiff. At the trial the title of the Japanese Custodian appears to have been assumed.

It was argued for the plaintiffs that the tenancy created by the Japanese Custodian was illegal and was in any case terminated by operation of law as a transaction not binding after the end of the occupation of Malaya by the Japanese.

The trial Judge, Spenser-Wilkinson J., decided against the plaintiffs and dismissed the suit without deciding the question of jurisdiction.

The plaintiffs appealed on the ground that the defendants had failed to establish:—(1) that the Japanese Custodian of Enemy Property had title or authority to grant a tenancy of the premises; (2) that he had validly granted such tenancy. The defendants gave notice of intention to contend that the judgment should be varied on the ground that by reason of the Ordinance the Court had no jurisdiction to hear and determine the suit.

The appeal was heard on the 9th July 1947.

Cases referred to :—

(1) *Yeoh Peck Chie v. K. S. Gill and Company* (1946) M.L.J. 131.

(2) *Warne v. Beresford* (1837) 6 L.J. Ex. 192.

E. D. Shearn (with him **T. Rajendra** and **Morris Edgar**) for the appellants argued the matter raised in the appeal.

B. J. P. Joaquim (with him **Kitson Khong**) argued **contra**. He further argued that the suit was covered by Section 3 (i) (d) of the Ordinance, citing **Yeoh Peck Chie v. K. S. Gill and Co.**(1). He contended that as the appellants admitted a letting by the Japanese Custodian no question regarding the circumstances of this letting could be considered.

E. D. Shearn (in reply) argued that before the Court could decide that there was no jurisdiction it must first decide whether there was a "dealing in land." A "dealing in land" was a transaction whereby land was affected and it was not shown that the land was affected unless the respondents established the title of the Japanese Custodian and his authority to act and that he had acted validly.

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The appeal was further argued on 22nd September 1947, at the request of the Court, on the question of whether the Courts (Restriction of Civil Jurisdiction) (Amendment) Ordinance, 1947, which came into force on 1st April, 1947, affected the matter.

Counsel as before.

B. J. P. Joaquim for respondents — Amending Section 2 (d) (a) of the Ordinance does not apply to existing suits because it is substantive, not procedural legislation: also in effect it partially repeals Section 3 (i) (d) of the Ordinance and thus does not affect existing suits by reason of the Interpretation and General Clauses Ordinance (S.S.), Section 5 (d) (iv).

If the Section applies to existing suits, this suit is not within the section unless the respondents are lessees or tenants.

If they are lessees or tenants, their tenancy has not expired. It has not been determined by act of parties or by effluxion of time. Therefore it can only have been determined by operation of law. It is not competent to raise this point because it has already been specifically decided by the trial Judge and no appeal has been made against this decision.

If it is held that the tenancy has been determined by operation of law, then it has not been so determined "since the 30th day of September, 1945". The law which could have had this effect came into operation at the time of the liberation, which took place before the 30th September 1945.

Amending Section 3 (2) is procedural and its language clearly indicates that it is intended to apply to existing suits. The Court has power to grant a stay but any stay must take effect prior to any hearing and determining of the suit. If there is no jurisdiction all hearing and determining on any point other than that of jurisdiction itself is a nullity.

E. D. Shearn. Amending Section 2 (d) (a) of the Ordinance applies to existing suits. Where jurisdiction is given to a Court during the pendency of a suit it applies to that suit (**Maxwell's** Interpretation of Statutes, 9th Edn. p. 233;) **Warne v. Beresford**(2). The Section of the Interpretation and General Clauses Ordinance relied on by the respondents applies only where "rights" are affected: here there is no question of rights but of jurisdiction.

Assuming that the Japanese Custodian created a valid tenancy, nevertheless the respondents' tenancy (if any) was determined subsequently to the 30th September 1945. Whatever they got from the Japanese Custodian could only have been co-existent with his authority. (See **Oppenheim's** International Law, 6th Edn., p. 432.) His authority ceased on the liberation and thereafter respondents were tenants on sufferance. A tenant on sufferance is not entitled to notice. The landlord's letter dated 13th November 1945 was sufficient to determine a tenancy on sufferance.

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On the 23rd September 1947 the Court announced that their judgment would be that the Court had no jurisdiction and that the judgment of the Trial Judge would be set aside and a stay of proceedings granted. Argument as to costs was then heard.

Willan, C. J. : —The facts are as follows :—

(a) The first appellants were the tenants of the premises No. 95 High Street, Kuala Lumpur, from the year 1937 until the month of April, 1944. In that month the first appellants sub-let the whole of those premises to a Japanese Military Regiment, on the demand of that Regiment, and this sub-letting was reported by the first appellants to the Japanese Authorties by letter dated the 8th day of April, 1944.

(b) In May, 1944, i.e. one month later, the Japanese Custodian of Property transferred these premises to a Japanese who was a military contractor.

(c) In June or July, 1945, this Japanese military contractor sold the goodwill of his business to the respondents, and the Japanese Custodian of Property let the premises to the respondents as monthly tenants.

(d) These premises, No. 95 High Street, Kuala Lumpur, are owned by the second appellant who during the Japanese occupation was absent from Kuala Lumpur and declared by them to be an enemy.

(e) On the 10th day of November, 1945, the second appellant wrote to the first appellants offering them a tenancy of the premises on a monthly basis upon certain terms, one of which was that the first appellant should make his own arrangements to eject the respondents from the premises. This offer was accepted by the first appellant on the terms stated.

(f) The second appellant did not at any material time give to the respondents notice to quit, but the first appellants, in accordance with the arrangements mentioned in paragraph (e) above, by letter dated the 19th day of November, 1945, demanded vacant possession of the premises on the 31st day of December, 1945.

(g) The respondents are still in possession of the premises and, from the month of September, 1945, to the month of July 1946, (the month in which the plaint was filed in this suit) have tendered rent from time to time, to the second appellant. The second appellant has refused to accept rent at any time from the respondents.

On these facts the appellants claimed recovery of possession of the said premises from the 1st day of October, 1945, and damages amounting to $10,000.

The defences to this suit were:—

(a) That the Japanese Custodian of Property was the competent authority in June or July, 1945, to let these premises to the respondents.

(b) That the second appellant has not served any notice to quit on the respondents and that, there being no mutuality of contract between the first appellants and the respondents, the letter dated the 19th day of November, 1945, from the first appellants to the respondents, demanding vacant possession of the premises as from the 31st day of December, 1945, has no validity.

(c) That since rent has been tendered by the respondents to the second appellant and has been refused, it has not been in arrear, and therefore the permission of the Rent Assessment Board under section 7 of the Federated Malay States Rent and Charged Land (Restriction) Enactment, 1940, is a pre-requisite to maintaining this suit.

(d) That since the suit arises out of and in respect of a tenancy created during the Japanese occupation the Court is precluded from hearing and determining the suit on account of the provisions of paragraphs (c) and (d) of sub-section (1) of section 3 of the Courts (Restriction of Civil Jurisdiction) Ordinance, 1946.

The learned trial Judge dismissed the suit on the two grounds following:—

(1) That the appellants had not satisfied him that the tenancy created by the Japanese Custodian of Property in favour of the respondents was in any way illegal at the time it was created.

(2) That the tenancy of the respondents was not terminated by operation of law because the letting of the premises to them by the Japanese Custodian of Property was a legitimate act which the re-occupying power was bound to recognise, and therefore the second appellant, on her return to Malaya, found a monthly tenancy in favour of the respondents existing. That she, herself, had taken no steps to terminate that tenancy and therefore it still exists.

Having dismissed the suit on the grounds the learned trial Judge stated that he found it unnecessary to decide whether or not the defence raised in paragraph (d) above, that is whether the Court had jurisdiction to hear and determine the suit, was a good defence or not.

Sub-Section (1) of section 3 of the Courts (Restriction of Civil Jurisdiction) Ordinance, 1946, so far as it is relevant to this appeal, is as follows :—

> Notwithstanding the provisions of the Courts Ordinance, 1946, no Court constituted thereunder shall, during the continuance in force of this Ordinance, have jurisdiction to hear and determine any suit, action or other proceeding whatever —
>
> (c) relating to land, wherein the cause of action arose during the said period; or
>
> (d) concerning any dealing in land which took place during the said period;

By the same sub-section "the said period" is from the 7th day of December, 1941, to the 30th day of September, 1945.

By virtue of the provisions of 1932 Rule 1 sub-rule 31, the Federated Malay States Rules of Practice and Procedure, the respondents were entitled to raise in their written statement of defence the point of law that the Court had no jurisdiction to hear and determine the suit in view of the provisions of sub-section (1) of section 3 of the Courts (Restriction of Civil Jurisdiction) Ordinance, 1946, set out above. 1932 Rule 1 sub-rule 31 is as follows :—

> Any party shall be entitled to raise by his plaint, written statement, counter-claim or reply any point of law, and any point so raised shall be disposed of by the Court or the Judge trying the suit at or after the trial, provided that, by consent of all persons concerned or by the order of a Judge on the

application of any person concerned, the point of law may be set down for hearing and disposed of at any time before the trial.

Accordingly, in view of the provisions of that sub-rule the learned trial Judge was wrong in not deciding the point raised in the written statement of defence whether or not he had jurisdiction to hear and determine the suit.

Since this particular point of law was raised in the Court below and was also relied on by the respondents in this Court I proceed to decide it now.

Mr. Joaquim, for the respondents, referred to the definition of "dealing" in section 2 of the Courts (Restriction of Civil Jurisdiction) Ordinance, 1946, which is as follows :—

> 'dealing' means in relation to land any transaction between parties, of whatever nature by which land is affected or any contract or agreement for such a transaction and includes a caveat.

By the same section 'land' includes houses and other buildings.

Mr. Joaquim also referred to a decision of my own in the case of *Yeoh Peck Chie v. K. S. Gill and Company*[1], in which I held that the word "concerning" in paragraph (d) of sub-section (1) of section 3 of the Courts (Restriction of Civil Jurisdiction) Ordinance, 1946, means "with reference to" or "regarding" or "pertaining to". Hence, according to Mr. Joaquim, applying these meanings to paragraph (d) of sub-section (1) of section 3 of that Ordinance as regards this particular suit, that paragraph could be read :—

> regarding (or with reference to or pertaining to) the transaction between the Japanese Custodian of Property and the respondents which took place in June or July, 1945.

Mr. Shearn, for the appellants, argued that the respondents had not proved that the Japanese Custodian had power to let these premises to them and therefore since no title from the Japanese Custodian of Property to the respondents had been proved, the transaction between that officer and the respondents is a nullity and therefore is not a dealing affecting the land.

I am unable to accept that argument. It is clear that there was a dealing in land between the Japanese Custodian of Property and the respondents which took place during the prohibited period — that is the period between the 7th day of December, 1941, and the 30th day of September, 1945. Whether that dealing is a nullity or not is in my opinion immaterial. If I were to decide whether or not it is a nullity I should be examining all the facts and circumstances of that "dealing", which is what the Court is prohibited from doing by the express terms of the Courts (Restriction of Civil Jurisdiction) Ordinance, 1946. To decide otherwise would mean that any person could allege that a dealing in land, to which he is a party, made during the prohibited period was, for instance, a fraudulent dealing and thus demand that the issue of fraud should be decided. This would be contrary to the express intention of the Courts (Restriction of Civil Jurisdiction) Ordinance, 1946.

Accordingly I decide that the respondents must succeed on the point of law raised at the trial that the Court below had no power to hear and determine this suit in view of the provisions of paragraph (d) of sub-section (1) of section 3 of the Courts (Restriction of Civil Jurisdiction) Ordinance, 1946.

At the hearing of the suit in the Court below no reference was made to the Courts (Restriction of Civil Jurisdiction) (Amendment) Ordinance, 1947, which was published in the Supplement to the Malayan Union Gazette of the 16th of April, 1947. This is not surprising because the trial took place on that date, and therefore neither the learned trial Judge, nor counsel at the trial, could have known of the existence of that amending Ordinance, because it invariably takes a few days for copies of the Gazette to be distributed after publication.

At the hearing of this appeal no reference was made to that amending Ordinance and, for that reason, this appeal was re-listed to give counsel for both the appellants and the respondents an opportunity to argue whether that amending Ordinance affects in any way the provisions of paragraph (d) of sub-section (1) of section 3 of the principal Ordinance in this particular suit.

The specific provisions of that amending Ordinance to which I refer are contained in paragraph (d) of sub-section (2) of section 2 of the Courts (Restriction of Civil Jurisdiction) (Amendment) Ordinance, 1947, which reads as follows :—

> "(d) A suit action or proceeding which prays for
> (a) the recovery of possession of land from a lessee or tenant whose term or tenancy has, since the 30th day of September, 1945, expired or been determined in accordance with the terms or provisions, either express or implied, of his lease, agreement or tenancy
> .....
> shall not be deemed to be a suit action or proceeding concerning a dealing in land which took place during the period mentioned in section 3 of this Ordinance merely by reason of the fact that the term or tenancy commenced or was created during such period."

Having heard the further arguments regarding this amendment, I am of the opinion that it is not applicable because there is no evidence to show that the tenancy of the respondents has expired or been

determined since the 30th day of September, 1945, in accordance with any express or implied terms or provisions of their tenancy from the Japanese Custodian of Property. I am fortified in this view by the provisions of the Leases and Tenancies (Dispossessed Persons) Ordinance, 1946, which provides, *inter alia,* a remedy for persons who lost the possession of premises during the period of Japanese occupation by being evicted therefrom by the Japanese, as is the case of the first appellants.

Accordingly the learned trial Judge should have decided that he had no power to hear and determine this suit. Since he would not have been aware of the existence of the new sub-section (2) to section 3, added by the Courts (Restriction of Civil Jurisdiction) (Amendment) Ordinance, 1947, (which gives the Court power to stay a suit barred by sub-section (1) of section 3 of the Courts (Restriction of Civil Jurisdiction) Ordinance, 1946), for the reasons stated earlier in this judgment, the learned trial Judge should have dismissed the suit.

In view of the power of stay which, by section 1 of the Courts (Restriction of Civil Jurisdiction) (Amendment) Ordinance, 1947, takes effect from the 1st day of April, 1947, (this suit as already stated having been heard and determined after that date) this Court has power to impose a stay order.

Accordingly the judgment and order dated the 19th day of April, 1947, of the Court below are set aside on the ground that the trial Judge should have held that in view of the provisions of paragraph (d) of sub-section (1) of section 3 of the Courts (Restriction of Civil Jurisdiction) Ordinance, 1946, the Court had no jurisdiction to hear and determine Civil Suit No. 9 of 1946.

There will be an order under sub-section (2) of section 3 of the said Ordinance that all further proceedings in that suit be stayed until the Courts (Restriction of Civil Jurisdiction) Ordinance, 1946, is repealed or otherwise amended to permit of the Court hearing and determining that suit.

When that event occurs, liberty to apply to set down the suit for hearing, and, on being so set down, there will be a new trial.

As regards costs — since the defendants-respondents pleaded in their written statement of defence that the Court had no jurisdiction to hear and determine the suit on account of the provisions of section 3 of the Courts (Restriction of Civil Jurisdiction) Ordinance, 1946, they are entitled to the costs of the trial in the Court below, but I would restrict those parts of the costs which relate to the hearing of that suit to that particular issue only, because it is clear from the record that the defendants-respondents did not, as they should have done, press for that particular issue to be decided before the merits of the case were gone into. Hence as regards costs in the Court below, the costs of the whole suit will go to the defendants-respondents except in so far as they were increased by the fact that the hearing was not restricted to the particular issue as to whether the Court had jurisdiction to hear and determine the suit.

As regards the costs of the appeal, the plaintiffs-appellants appealed against a judgment on the merits, and the defendants-respondents cross-appealed on the ground that the judgment of the Court below should be varied to the following extent, namely :—

> That in any and every event the Court has no jurisdiction to hear and determine this suit by reason of the provisions of section 3 (1) (d) of the Courts (Restriction of Civil Jurisdiction) Ordinance, 1946.

The defendants-respondents failed to include in their cross-appeal any reference to the existence of the Courts (Restriction of Civil Jurisdiction) (Amendment) Ordinance, 1947. At the hearing of this appeal on the 19th day of July, 1947, neither counsel for the defendants-respondents nor counsel for the plaintiffs-appellants drew the attention of the Court to that amending Ordinance.

After the hearing of the appeal had concluded on that day the members of the Court themselves discovered the existence of that Ordinance, and it was this which necessitated a further day being fixed for the hearing of this appeal, to deal with what effect, if any, that Ordinance has on this matter. This extra day's hearing would not have been necessary if the existence of that Ordinance had been brought to the notice of the Court on the 19th of July, 1947, when the appeal was first heard.

Since the defendants-respondents by their cross-appeal were asking for the judgment of the learned trial Judge to be varied on account of the existence of the Courts (Restriction of Civil Jurisdiction) Ordinance, 1946, they should have brought to the notice of the Court the existence of the amending Ordinance to which I have already made reference. If they had done so, the extra day's hearing of this appeal would not have been necessary.

Therefore, as regards the costs of the appeal itself, I would make no order thereon, but would allow the defendants-respondents the costs of their cross-appeal, but only up to and including the hearing of the appeal on the 19th day of July, 1947.

Appeal Allowed.